No. 2873

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

JOE PABLO,
Plaintiff in Error,

vs

UNITED STATES OF AMERICA,
Defendant in Error.

APPELLEE'S BRIEF.

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Brief of Defendant in Error.

In the above entitled cause we have been served with the printed brief of the plaintiff in error, and upon such brief we desire to base the following motion:

Comes now the United States of America, defendant in error, in the above entitled cause, and moves this Honorable Court to dismiss the appeal of the above named plaintiff in error for the reason and upon the ground that the brief heretofore served and filed herein by the plaintiff in error does not con-

tain a specification of the errors relied upon as required by Subdivision B of Rule 24 of the rules of the above entitled court, adopted November 1, 1894, as amended June 2, 1916, or specification of errors in proper form or manner.

WHEREFORE defendant in error prays that the appeal of plaintiff in error herein be dismissed.

ARGUMENT ON MOTION

In the brief of plaintiff in error served and filed, which is defective by reason of a lack of specification of errors as required by the rules of this court, there is a mass of disconnected paragraphs which in themselves do not set out the testimony objected to and the objections themselves, which makes it difficult, indeed, for a logical reply to be framed by the defendant in error. We submit that the court should grant the motion to dismiss this appeal.

ARGUMENT ON MERITS.

In the event this court should not grant the foregoing motion, we desire to observe the following:

The statement of the case contained in the purported brief of plaintiff in error herein is erroneous and most misleading, for, although it is true, as appears from the indictment in the record (Tr. pp. 2-4) that the plaintiff in error was indicted on three separate charges contained in three separate counts in said indictment, nevertheless the jury by its verdict (Tr. p. 8) acquitted the plaintiff in error as to counts one and two of the indictment and found him

guilty in manner and form as charged in count three thereof. To this extent we wish to correct the statement of the case in paragraph 1, page 3 of the brief of plaintiff in error.

It is well to bear in mind in this case that many of the labored arguments of plaintiff in error are made in an effort to show that reversible error was committed in the trial of the case, but we submit that if any error was committed by the trial court relating to evidence introduced for the purpose of sustaining the charges contained in counts one and two of the indictment or by instructions to the jury properly excepted as to those counts, that inasmuch as the government had made out a case that was warranted to go to the jury, such error cannot affect the verdict of the jury as to count three, which is the sole one upon which Pablo was convicted (Tr. p. 8).

See: Diggs v. U. S., 220 Fed. 545 at page 553;
Cook vs. U. S., 159 Fed. 919.

This is such a self-evident proposition that we do not burden the court with useless citation of authorities.

THE TESTIMONY OF CHARLES HUNTER.

The telegraphic communication of the fact that the President had pardoned Charles Hunter was sufficient to apprise the court of an executive act of the President, and as the trial judge said when such act was called to the attention of the court he could

take judicial notice of it, and counsel for plaintiff in error himself stated he could not question the telegram (Tr. p. 15, lines 31-32) Indeed, the court stated if an error had occurred and no pardon had been actually granted it could be called to the attention of the court on a motion to set aside the verdict (Tr. p. 16, lines 3-16). No such motion was ever made and, indeed, no attempt could have been made to show the pardon was not granted as the court was informed had been done, for the reason that the pardon was duly received through the mails in due time and counsel himself for plaintiff in error so advised. It was never imagined that an attempt would ever be made to secure a reversal of this case on any such ground, or an interpolation of such fact would have been made in the record such as plaintiff in error was permitted to do on page 16, lines 28-32.

Of course, the evidence of Hunter was not to the liking of plaintiff in error and we do not believe defendants as a general rule find any evidence of the prosecution's witnesses that is not damaging to the defense.

We have no fault to find with the authorities cited on page 20 of the brief of plaintiff in error insofar as they hold that the pardon should be full and complete. No question as to the completeness of pardon appears in the record in the case at bar, hence we can dismiss it from our consideration. There is no such thing as a charter of pardon under the great seal in the United States as mentioned

in lines 5 and 6, on page 21 of the brief of plaintiff in error, and that being the case his citations to the effect that one under the great seal must be produced is not in point. Plaintiff in error is merely trying to magnify an immaterial matter into something enormous for the purpose of securing a reversal on a technical ground, if indeed it should be thought that the judicial notice of the President's executive act was improper.

We are unable to see any relevancy of Singleton vs States, 35 L. R. A. 251 to the question now under consideration. We have under consideration the question as to whether or not a telegram advising that a full and complete pardon had been granted by President Wilson was sufficient evidence of the fact that Hunter had been fully pardoned. The telegram itself does not appear in the record and it is to be presumed that it was sufficient to apprise the court of the fact that a full and complete pardon had been granted. The last four lines on page 16 of the transcript are merely a gratuitous statement by counsel of plaintiff in error and are not the words of the telegram. We contend no error was committed by admitting Hunter's testimony as counsel do not contend that Hunter was not pardoned but merely that we did not produce the original pardon, which contention if sustained as reversible error would be to thwart justice by the most technical of technical reasons. The testimony of Hunter finds abundant corroboration throughout the record, even the testimony of plaintiff in error corroborates part

of that given by Hunter.

Hunter testified: He was in Missoula and left with Pablo, Hull, Pritchett, and Stevens in an automobile for Ronan on the Flathead Indian Reservation; that they stopped at the Montana Bar and he and Pritchett got out and went in to get liquor, which they did; the entire party started on the trip to Ronan, had drinks on the way; stopped a few miles out and got a bottle which was cached along the road by a fence; Pablo drank as did the rest except Hull; they proceeded to the reservation stopping at Johnny Matts, Coutures, Pritchett's homes, Pablo's house and then went on to Ronan (Tr. pp. 15-26). At least as to this portion of Hunter's testimony corroboration is to be found in the testimony of the following witnesses: Charles Stevens (Tr. pp. 27-30) as to the trip as far as Matt's; Lawrence Pritchett (Tr. pp. 30-32; 33-34) as to the trip as far as Pritchett's house; Joe Pablo's (testimony of plaintiff in error) (Tr. pp. 49, 50, 51, down to cross examination on page 52; from line 9 page 54 down to line 15 on page 56). Pablo's testimony, of course, contains many denials of various things Hunter testified to but in the main the passages referred to show Hunter was truthfully testifying.

The witness Phil Hull, who was the driver of the car, corroborates a great deal of what Hunter testified to, sufficiently at least to show Hunter was truthful (Tr. pp. 61-68).

Gibeau (Tr. pp. 38-42); Ramsey (Tr. pp 43-44); Jaeck (Tr. pp. 68-70), and Thompson (Tr. pp. 70-

72) also corroborate Hunter as to what happened between St. Ignatius and Ronan.

So in the last analysis of Hunter's testimnoy we find so many testifying to practically everything he did that if by any chance it is thought error occurred by permitting him to testify under the circumstances, still the record contains evidence to the same effect to such an extent that no error sufficien or worthy of predicating a reversal thereon exists.

BEST EVIDENCE-PRODUCTION.

The third assignment of error is one based on an objection interposed by counsel, but neither the transcript of the record, page 41, or the specification of errors No. 3 quotes the question asked the witness and the objection interposed does not cover the point to which all arguments under this head is directed. The argument is entirely directed to the fact the best evidence as to what was on the labels was the lables themselves. The objection was "we object to the witness testifying to the labels on the bottles." There was no objection comprehensive enough to include the argument that plaintiff in error relies upon. The testimony merely was a description of the bottle itself and a statement that it had a label on it and on the label was the word "whiskey." We submit that no proper objection having been made that the admission of the testimony in itself is harmless.

The most that can be said of Gilbeau is that he

stated the label on the broken bottle had the word "whiskey" upon it. This far from a complete statement by him as to the contents of the label. It is at most a mere descriptive expression. We find by referring to page 44 of the transcript, lines 22-32, and page 45, lines 1 to 5, that the witness Ramsey testified that he got in the automobile at Ronan with Gilbeau and they went down to the place that Gilbeau pointed out as the point on the road where the Pablo automobile left the main road and took to the woods; that he and Gilbeau went around that road, looked for some broken bottles and he picked up some there at that time; Ramsey further stated that he could not tell what had been in the bottles except from the paper and the labels and that he knew the labels that were on the bottles; that the main label was "Joel B. Frazer Whiskey" and that there was a government stamp over the top of the bottle which said 100% proof 1/5 gallon. This complete testimony on the part of Ramsey as to what was upon the labels went in without any objection on the part of plaintiff in error and being corroborative, indeed, amplification of Gilbeau's testimony eliminated any possible chance of error by the trial court in permitting Gilbeau to testify as he did. Gilbeau and Ramsey are corroborated as to picking up the bottles by the testimony of Yaeck (Tr. p. 69, lines 26-31), and Thompson (Tr. p. 71, lines 22-24). Yaeck and Thompson were both witnesses for the plaintiff in error at the trial.

All of the citations of authorities contained in the

brief of plaintiff in error under this heading do not apply as the objection is not comprehensive enough to take in the scope of the argument and the points now relied upon by plaintiff in error as to this question.

TESTIMONY OF HARRY PRITCHETT.

The testimony urged to be error in subdivision V of the brief of plaintiff in error relates entirely to the testimony given by Pritchett as to the offenses charged in counts one and two of the indictment. As heretofore observed, plaintiff in error was acquitted of those two charges and the testimony so given was in no way related to the charge for which he was convicted in count three. Having no bearing on count three, it cannot be reversible error for the reason that the jury could not have considered it in any sense because the charges in counts one and two were alleged to have occurred on the 6th and 5th days of September, 1915, and the charge in count three is alleged to have occurred on October 5, 1915, or thirty days after the first two, so it could not have been confusing or misleading to the jury. Indeed, the objeection to this question was based on the fact that the witness had immediately preceding the question objected, stated "I did not have any conversation with him at that time to amount to anything; I saw him there." (Tr. p. 80, lines 28-30). The judge held that it was not for the witness to pass upon the fact as to whether Pablo had said something that amounted to anything. The United

States was trying to find out and did find out what the defendant said and the propriety of allowing witnesses to so testify fully appears by lines 15 et seq., on page 28 of the transcript.

As to the further objection that it was not a proper impeaching question, the court's comment that you can always contradict the defendant on material matter, is correct. Indeed, the objection does not state that there was no ground laid for the impeachment, but held that it was not a proper impeaching question, neither are tenable if both had been made properly. Indeed, this testimony was not concerning a separate offense on the part of plaintiff in error but was directly connected with the happenings on September 5th and 6th, and the hand game then going on at Arlee when and where the offenses charged in the first two counts of the indictment were alleged to have been committed and about which the defendant had testified fully and endeavored to place the guilt of having introduced the whiskey into the Indian Reservation upon this witness, Pritchett. There is no objection that it was not proper testimony in rebuttal.

MISCONDUCT.

The argument relating to the testimony of Pritchett in the paragraph last preceding as to the matter being one which related to counts one and two applies here also.

In order to assist the court we state that it is to be found at the bottom of page 85 of the transcript and

also on the first half of page 86 thereof. The slightest reading will show by comparison it was that portion of Pablo's testimony relating to the first two counts of the indictment of which he was acquitted. The part Mr. Wheeler read is found on page 48 of the transcript from line 12 to 17, and was a part of the direct examination of Pablo, for which the United States Attorney was in no manner responsible. Many a defendant when a witness will inadvertantly tell the truth, which we believe Pablo did in this instance. Again he might have misunderstood the question. Whichever way it was, was cearly a question for the consideration and determination of the jury and a proper subject for comment during the argument by the United States Attorney. The questions and answers following what Mr. Wheeler read were merely the clever ruse of counsel for the defendant Pablo in an effort to extricate him from a nasty admission which his counsel wished cleared up. The jury was the one to say whether he understood and answered the first question. Judging his testimony as a whole it is entirely probable and most possible that Jablo meant exactly what he said in answer to Mr. Besancon's question, for the emphasis in the question is the last part of it "did you go down to the Chinaman and get a bottle?" as that was one of the vital points as to that count. But as we have heretofore observed the error is harmless as it related to the first and second count.

The citations in the brief of plaintiff in error

under this heading are not in point, as Mr. Wheeler did not state a fact not borne out by the testimony or misquote any testimony; he read in full a portion only, which is entirely proper, and he made no exaggerated claims as to what the testimony showed. It can hardly be claimed that counsel for either side in a case must read an entire transcript of the testimony while arguing. Such a contention would be absurd.

INSTRUCTIONS — ACCOMPLICES.

The marvelous conclusion of counsel for plaintiff in error that "we have almost concluded that the testimony of such witnesses (Hunter and Pritchett) convicted the defendant" (Tr. p. 34, lines 1-13), clearly shows either a lack of careful study of the record or a desire to mislead this court. We have heretofore under the heading "Testimony of Charles Hunter" made a resume of the main facts wherein Hunter was corroborated, and inasmuch as the same is true as to Pritchett's testimony we will not repeat the same here.

The first rule of law in connection with accomplices is that under the common law a conviction upon the testimony of an accomplice was permissible, although such testimony was not corroborated. In many states the state laws have changed this rule and require the testimony of an accomplice to be corroborated. In other words the rule of law in many states forbids the conviction of anyone on the uncorroborated testimony of an accomplice. But

under the law of the United States a person charged with a crime may be convicted on the uncorroborated testimony of an accomplice. It is true the courts in some instances have modified this rule by decisions to which we will advert later.

In Wharton's Criminal Evidence (10th Ed.) Sec. 440, p. 922, an accomplice is defined as follows:

> "An accomplice is a person who knowingly, and with common intent with the principal offender, unites in the commission of a crime. The cooperation must be real and not merely apparent."

The definitions of accomplice given by plaintiff in error do not apply in Federal courts as they are all from states where there is a rule different from that in the Federal courts, hence the citations are not in point.

We find the question has often been treated by Federal courts and the rule as to accomplices clearly enunciated.

See

Hanley v. U. S., 123 Fed. 851;

Aheam v. U. S., 158 Fed. 606;

Richardson v. U. S., 181 Fed. 1;

Lung v. U. S., 218 Fed. 817;

Diggs v. U. S., 220 Fed. 545.

We submit that the instruction of the court as to

accomplices found on page 92 and the first four lines of page 93 fully covers the requested instructions numbered 1 and 3 and that being so no error occurred.

Kettenbach v. U. S., 202 Fed 377;

Bennett v. U. S., 227 U. S. 333.

The refusal to give requested instruction No. 3 was not error for the evidence discloses as to count 3 of the indictment that Pritchett was merely a passive onlooker and did not purchase, own or take part in the transportation of the liquor, indeed; he left the automobile before reaching Arlee and neither took with him or claimed any of the liquor as his own but permitted the others to ride off with the liquor which would have been done had he an interest in it. It is significant that plaintiff in error does not cite any Federal cases to support his contention as to this point. The cases cited by him are under state statutes and in no manner control this court.

We submit the question of accomplices was fully covered by the instructions of the court as given and no error occurred in refusing request numbered 3 as Pritchett is not shown by the testimony to come within the definition of an accomplice.

KNOWLEDGE—INSTRUCTION.

Requested instruction numbered 4 was properly refused as it was not warranted by the testimony and the court fully covered this phase of the case by

its instructions (Tr. p. 93 line 5 et seq.) The evidence conclusively showed that no one except Hunter and Pablo had any interest in the liquor. Stevens left the car first after having had the drinks en route, then Pritchett got out of the car, and the rest proceeded on the trip to Ronan with the liquor. Stephens and Pritchett certainly had no claim to the liquor or they would not have abandoned it thus if they were introducing it into the Indian country.

In conclusion we repeat that no error occurred on the trial of this case and the judge should be affirmed.

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